Supreme Court, U.S.
FILED
SEP 13 1995
CLERK

No. 95-253

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, ET AL.,
PETITIONERS

v.

EDWARD H. KOCH, ET AL.,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

KENNETH BALCOMB
(Counsel of Record)
SCOTT BALCOMB
LORI J. M. SATTERFIELD
DELANEY & BALCOMB, P.C.
P.O. DRAWER 790
GLENWOOD SPRINGS, CO 81602
(970) 945-6546

Attorneys for Respondents

SEPTEMBER 13, 1995

QUESTION PRESENTED

The Respondents submit that the question presented by the United States reflects its misreading of the law regarding patents of riparian lands. The Respondents believe that the question at issue is more properly stated as follows:

> Whether the intent of the United States when patenting riparian lands adjacent to a non-navigable river controls the transfer of insignificant land masses located between the meander line and the thread of the river.

TABLE OF CONTENTS

STATEMENT OF THE CASE 2

ARGUMENT: REASONS TO DENY THE PETITION 6
Summary of argument 6
Argument 8

CONCLUSION 25

SUPPLEMENTAL APPENDIX . . . . . (1sa)

TABLE OF AUTHORITIES

Cases:

Bourgeois v. *United States*, 545 F.2d 727 (Ct. Cl. 1976) 7, 8, 15-16, 18-19, 20
Cragin v. *Powell*, 128 U.S. 691, 696 (1888) 5
Grand Rapids & Indiana R. R. Co. v. *Butler*, 159 U.S. 87 (1895) 8, 9, 13-15, 16, 20
Hardin v. *Jordan*, 140 U.S. 371 (1891) 7, 9, 10, 11, 12, 13, 15, 16, 17
Mission Rock Co. v. *United States*, 109 F. 763 (9th Cir. 1901), *aff'd*, 189 U.S. 391 (1903) 7, 10, 11
Mitchell v. *Smale*, 140 U.S. 406 (1891) 7, 11-12, 13, 15, 17
More v. *Johnson*, 193 Colo. 489, 568 P.2d 437 (1977) 23
Moss v. *Ramey*, 239 U.S. 538 (1916) 7, 10, 13, 20, 22
Oklahoma v. Texas, 258 U.S. 574, 594-95 (1922) *20*
People v. *Emmert*, 198 Colo. 137, 597 P.2d 1025 (1979) 23
Emma S. Peterson, 39 Pub. Lands Dec. 566 (1911) 12-13
Ritter v. *Morton*, 513 F.2d 942 (9th Cir. 1975), *cert. denied*, 423 U.S. 947 (1975) 15-16, 18
Scott v. *Lattig*, 227 U.S. 229 (1913) . 7, 10, 13, 15-17, 18, 19, 20, 22

State Land Bd. v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977) 20
Texas v. *Louisiana*, 410 U.S. 702 (1973) 7
United States v. *Chandler-Dunbar Water Power Co.*, 209 U.S. 447 (1908) 10
United States v. *Goodrich Farms Partnership*, 947 F.2d 906, 908 (10th Cir. 1991) 23
United States v. *Severson*, 447 F.2d 631 (7th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972) 15-17
Whitaker v. *McBride*, 197 U.S. 510 (1904) 7, 15
Wolff v. *United States*, 770 F. Supp. 1205 (W.D. Mich. 1991), *aff'd*, 967 F.2d 222, *reh'g denied*, 974 F.2d 702 (6th Cir. 1992) 7, 8, 15-16, 19-20

Statutes:

COLO. REV. STAT. ANN. § 2-4-211 (West 1989) 23
Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1995) 12, 22
Federal Land Policy and Management Act of 1976 § 201, 43 U.S.C. 1711 9

Miscellaneous:

BLM, *Manual of Surveying Instructions* (1973) 12
SUP. CT. R. 10 6

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-253

UNITED STATES OF AMERICA, ET AL.,
PETITIONERS

v.

EDWARD H. KOCH, ET AL.,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondents respectfully request that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners.

STATEMENT OF THE CASE

The Respondents (collectively referred to herein as the "Landowners" or the "*Koch* Landowners") wish to correct certain inaccuracies and omissions in the United States' Statement, as follows:

This case concerns title to the bed of a non-navigable river. Five "islands" are the subject of this appeal. These "islands" were described in the deputy surveyors' field notes of the original 1889 and 1891 surveys as "gravel bars" or "islands" not required to be meandered under the then-controlling Surveyor's Instructions.[1] The plat prepared from

---

[1] The parties entered into a stipulation on June 12, 1989, which was part of the record before the Administrative Law Judge and at the succeeding stages of this proceeding. For this Court's reference, the Landowners have submitted the stipulation in the Supplemental Appendix to this Response Brief, *infra*, pp. 1sa-25sa (cited hereinafter as "Supp. App."). In that stipulation, the parties set forth (among other provisions) the instructions governing the applicable surveys, and the surveyors' notes regarding the subject "islands." The surveys of these "islands" were conducted by Deputy Surveyor Churchfield in 1899 (pursuant to the 1855, 1864, and 1881 instructions), and by Deputy Surveyor House in 1891 (pursuant to the 1890 instructions, which did not change the 1864 instructions regarding the survey of small islands). Included in these surveyors' contracts was the charge to survey all islands, defined as "a body of land separated from the mainland by a perpetual natural channel." *See* 1864 Instructions quoted in Supp. App., *infra*, pp. 11sa-13sa, para. III.C.2.

As stated by the Administrative Law Judge:

> Fairly summarized it can be said that the instructions governing the original surveys required all islands between the surveyor established meander lines of the Colorado River to be meandered. Those

these surveys also contained sketches of the "islands," and the field notes and plat were incorporated into the patents the United States conveyed to these Landowners' predecessors in title.

The Administrative Law Judge (ALJ) conducted an on-site investigation of the "islands" at issue, considered first-hand the testimony and credibility of the United States' and the Landowners' witnesses, and relied upon the parties' stipulation[2] regarding certain controlling factual and legal issues. He found that the land masses were not islands at the time the original surveys were conducted; they "were included in the original survey and not omitted therefrom." U.S. App. at 36a-37a.[3]

Among the significant issues to which the parties stipulated are these:

1. The original surveys were required to be completed in strict conformity with the laws of the United States and the applicable survey instructions. No surveys

---

> instructions also required the deputy surveyor to take field notes in which he was to exercise "the utmost care . . . to pass no object of topography . . . without giving a particular description."

U.S. App. at 25a. The parties do not dispute this finding of the ALJ.

2 *See supra* note 1.

3 Throughout this Response Brief, "U.S. App." shall refer to the Appendix to the United States' Petition for a Writ of Certiorari.

were approved by the United States Surveyor General until found to have been in exact accordance with the governing instructions.

2. The original Government Land Office plats and field notes of the areas surveyed, having been incorporated by reference in the original patents, are a part of the description of the lands granted.

3. An "Island" is a permanent land mass rising from the bed of a meanderable body of water above the mean high water mark, separated from the mainland by a perpetual channel.[4]

See Supp. App., *infra*, pp. 6sa-7sa, 22sa, para. III.B.1, VI.3, and VI.4, respectively.

Considering this stipulation between the parties, the Landowners are surprised that the United States now argues that "surveyors did not always understand or fastidiously follow the [surveying instructions] given them," U.S. Pet. at

---

[4] Deputy Surveyors Churchfield and House did not meander the "islands" which are the subject of this appeal. The Landowners have consistently maintained that these surveyors did not survey the subject "islands," because at the time the surveys were conducted, these land masses did not meet the surveying instructions' definition of an island. *See* governing survey instructions cited *supra* note 1. In support of this argument, the Landowners emphasize that Churchfield meandered at least two islands in the relevant stretch of the Colorado River. *See* Supp. App., *infra*, pp. 18sa-19sa, para. III.D.2.

6,[5] and that the "islands" were "mentioned . . . in the surveyors' field notes and sketched onto the accompanying plat, which created a reference for future survey and disposition," *id.* at 7. (The United States cites no authority for this "future reference" statement.) As the United States has stipulated, and as supported by this Court's decisions, the *Koch* "islands" were described on the plat and incorporated into the description of the property conveyed by patents to the Landowners' predecessors. *See* Supp. App., *infra*, p. 22sa, para. VI.3. *See also, Cragin* v. *Powell*, 128 U.S. 691, 696 (1888) ("It is a well settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself.").

Nearly 100 years have passed since Deputy Surveyors Churchfield and House conducted their surveys of the subject Colorado River lands, and since the United States patented the riparian lands to the *Koch* Landowners' predecessors without any reservations, express or implied.[6] Not until 1982 did the United States show any interest in the subject "islands." Prior to that time, it had continuously stated to

---

[5] Throughout this Response Brief, "U.S. Pet." shall refer to the United States' Petition for a Writ of Certiorari.

[6] Notably, the United States did not reserve any rights of way to the "islands" in the subject patents.

interested parties that no public lands existed in the relevant stretch of the Colorado River.[7]

ARGUMENT: REASONS TO DENY THE PETITION

Summary of argument

This Court should exercise its discretion to deny the United States' Petition for a Writ of Certiorari. No "special and important reasons" exist for this Court to hear this case. *See* SUP. CT. R. 10. The subject decision of the United States Court of Appeals, Tenth Circuit, is not in conflict

---

[7] The landowners filed with the Tenth Circuit a Supplemental Appendix to the Brief for Edward H. Koch, et al., Appellees, which included (in addition to the above-referenced stipulation) the following documents: Letter from Helen Odegaard, Acting Assistant Manager, Branch of Lands Adjudication, Bureau of Land Management (BLM), United States Department of the Interior, to Robert C. Cutter (May 19, 1966); Letter from R. Keith Miller, District Manager, BLM, United States Department of the Interior, to Stanford Dere (Jan. 26, 197_); Memorandum from Vern E. Lane, Acting Chief, Branch of Cadastral Surveys (Sept. 19, 1969) (stating "I have attempted to clarify the public land ownership of riparian lands of that segment of the Colorado River from New Castle downstream to the Colorado-Utah boundary, and to my knowledge no public land areas have been overlooked."); and Decisions of the BLM (one such decision was included in the said Supplemental Appendix; three others were part of the record), Department of the Interior (Oct. 23, 1961), which memorialized the United States' rejection of offers to lease the Colorado River bed (wherein were located the "islands" here at issue). The Landowners submit that these documents evidence that the United States was not interested in the subject "islands" until approximately 1982, when the BLM conducted an investigation and determined that it would claim the "islands" as unsurveyed public lands.

with the decisions of other courts of appeals or the United States Supreme Court on the same matter. *See id.*

A number of United States Supreme Court and lower federal court decisions have considered the issue of title to islands in watercourses. These cases may be grouped into two categories: those involving navigable watercourses,[8] and those involving non-navigable watercourses. The subject case involves "islands" in a non-navigable stretch of the Colorado River. No split of federal decisions exists with respect to title to islands in non-navigable watercourses. The controlling decisions in the non-navigable context include *Hardin* v. *Jordan*, 140 U.S. 371 (1891); *Mitchell* v. *Smale*, 140 U.S. 406 (1891); *Whitaker* v. *McBride*, 197 U.S. 510 (1904); *Bourgeois* v. *United States*, 545 F.2d 727 (Ct. Cl. 1976); *Wolff* v. *United States*, 770 F. Supp. 1205 (W.D. Mich. 1991), *aff'd*, 967 F.2d 222, *reh'g denied*, 974 F.2d 702 (6th Cir. 1992). In all of these cases, the courts found that title to the disputed lands was vested in the adjacent riparian landowners.

Moreover, when one considers the navigable watercourse cases and non-navigable watercourse cases together, one finds that the cases do not exhibit a split in reasoning or pose a threat to the United States' authority to survey and dispose of public lands. The cases collectively illustrate that the United States' intent determines the issue

---

[8] All of the primary cases upon which the United States relies are navigable-waters cases. These include, for example, *Texas* v. *Louisiana*, 410 U.S. 702 (1973); *Moss* v. *Ramey*, 239 U.S. 538 (1916); *Scott* v. *Lattig*, 227 U.S. 229 (1913); and *Mission Rock Co.* v. *United States*, 109 F. 763 (9th Cir. 1901), *aff'd*, 189 U.S. 391 (1903).

of title if that intent is clear; and that, where the United States' intent is ambiguous, the court decides the issue under the state's common law. *See e.g., Grand Rapids & Indiana R. R. Co.* v. *Butler*, 159 U.S. 87 (1895).

The United States District Court, District of Colorado, and the United States Court of Appeals, Tenth Circuit, both found in *Koch* that the United States did not evidence a clear intent to retain the subject "islands," and therefore under Colorado law, the title vested in the patentees of the abutting riparian lands. U.S. App. at 8a-12a, 76a-80a.

Argument

The sole alleged basis for the United States' Petition is that "[t]his case presents an important question of public land law that has generated a serious and irreconcilable conflict among the courts of appeals." U.S. Pet. at 11. At best, this statement reflects a stretch of reason; at worst, it is a misstatement of the law. No conflict between the courts of appeals exists.[9]

---

[9] In an effort to heighten the importance of this case, the United States "estimates" that "11,000 unsurveyed islands" remain within the public domain. U.S. Pet. at 13. This claimed retention of ownership lacks merit, however, unless the United States can establish an intent to reserve the islands when the riparian lands were patented. *See Grand Rapids & Indiana R. R. Co.* v. *Butler*, 159 U.S. 87 (1895) (*see* discussion in text pp. 13-15, *infra*). *See also*, *Bourgeois*, 545 F.2d at 730-31; *Wolff*, 967 F.2d at 225. In the *Koch* case, the United States did not show any interest in (much less any intention to reserve) the subject "islands" until nearly 100 years after the original surveys. Prior to that time, it had consistently maintained that no public lands existed

All of the courts of appeals' decisions on this matter are consistent with this Court's repeated pronouncements that the threshold issue to be determined is whether the United States has evidenced an intent to retain title to the islands. *See e.g.*, *Hardin* v. *Jordan*, 140 U.S. 371, 384 (1890); *Grand Rapids & Indiana R. R. Co.* v. *Butler*, 159 U.S. 87, 94 (1895). Where the United States' intent, express or implied, is not evident, the Court looks to state law to construe the grant. As this Court stated in *Hardin*, 140 U.S. at 384, "[i]n our judgment, the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed, as to their effect, according to the law of the State in which the lands lie."[10] Under the prevailing common law, "a grant of land bounded by a stream, whether navigable in fact or not, carries with it the bed of the stream to the center of the thread thereof." *Grand Rapids*, 159 U.S. at 94.

The Landowners submit that a review of this Court's decisions on this matter is instructive to illustrate that the

---

in the relevant stretch of the Colorado River. *See* discussion in note 7, *supra*.

The Landowners do not dispute that the Secretary of the Interior has the authority to "ascertain the boundaries of public lands." *See* U.S. Pet. at 12 (citing Federal Land Policy and Management Act of 1976 (FLPMA) § 201, 43 U.S.C. 1711 (1990)). However, even under FLPMA, the United States cannot survey and dispose of lands which it does not own.

[10] The lands in dispute in *Hardin* were a "streak or tongue of upland not covered by water at its ordinary height." *Id.* at 374. The subject lake was non-navigable in fact. *Id.* at 377.

Tenth Circuit's decision in *Koch* does not conflict with Supreme Court precedent or the decisions of the other courts of appeals.

Under the equal footing doctrine, the bed of a navigable river or lake passed to the state upon statehood. *See e.g., Hardin*, 140 U.S. at 381. This Court has held that an unsurveyed island in a navigable watercourse does not pass to the state but remains public land (subject to future disposition by the United States) if the following criteria are met: (1) the island existed as a stable formation at the time of statehood and was of significant size,[11] and (2) the United States intended to retain title to the island. Such intent can be imputed, for example, by a failure to survey the island due to obvious error on the part of the surveyor, *see Moss* v. *Ramey*, 239 U.S. 538 (1916); and *Scott* v. *Lattig*, 227 U.S. 229 (1913); or by the island's apparent value for military purposes, *see Mission Rock Co.* v. *United States*, 109 F. 763 (9th Cir. 1901), *aff'd*, 189 U.S. 391 (1903).[12]

---

[11] In *United States* v. *Chandler-Dunbar Water Power Co.*, 209 U.S. 447 (1908), this Court found that title to certain islands in a navigable watercourse had passed from the United States to the riparian landowner. It stated that "[t]he islands are little more than rocks, rising very slightly above the level of the water[,]" *id.* at 451, and that "[i]f they had belonged to the United States, probably they would have passed as unsurveyed islands and neglected fragments pass[,]" *id.* at 452. Because the islands were of "no apparent value," *id.* at 451, the Court would not find that the United States intended to reserve them from the patent to the riparian landowner.

[12] *Mission Rock* presented a question somewhat distinguishable from the issue of the United States' intent considered in *Moss* and *Scott*. The patent to Mission Rock's predecessor in title was from the State of California, which could not convey islands that had not

In contrast, ownership of the beds of non-navigable watercourses did not pass from the United States to the states under the equal footing doctrine. Common law governs title to the bed and islands within non-navigable watercourses, and under common law the riparian landowner is entitled to all islands lying between the edge of the riparian land and the center of the watercourse. In *Hardin*, this Court cited with approval the "well said" holding of the Illinois Supreme Court in *Middleton* v. *Pritchard*, 4 Ill. 510:

> [A]ll grants bounded upon a river not navigable by the common law entitle the grantee to all islands lying between the main land and the centre thread of the current. And we feel bound so to construe grants by the government, according to the principles of the common law, unless the government has done some act to qualify or exclude the right.

140 U.S. at 384 (emphasis added). Thus, even in non-navigable watercourse cases, the intent of the United States is deemed elemental to the title analysis.

In *Mitchell* v. *Smale*, 140 U.S. 406 (1891), a companion case to *Hardin*, this Court explained the policy supporting the rule that the exposed lands within the watercourse belong to the adjacent riparian landowner (pursuant to common law), under circumstances where the United States' intent to reserve the islands is unclear:

---

passed to the state under the equal footing doctrine. *Mission Rock*, 189 U.S. at 404.

> [W]e think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more or less than taking from the first grantee a most valuable, and often *the* most valuable, part of his grant. Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment; and to place such persons in possession under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation which ought not to be created or sanctioned.

140 U.S. at 412-13.[13]

---

[13] This statement regarding "vexatious litigation" has caused the *Koch* Landowners to request attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1990). Ignoring this Court's holdings in (for example) *Hardin*, *Mitchell*, and *Grand Rapids*, the United States has developed its own exceedingly broad rule of law "that the United States retained ownership of unsurveyed public islands." U.S. Pet. at 11. *See also, id.* at 27. As purported authority for this statement, the United States relies upon the decision in *Emma S. Peterson*, 39 Pub. Lands Dec. 566 (1911), and the BLM, *Manual of Surveying Instructions* (1973).

The Landowners submit that the United States' reliance upon *Emma* and its own surveying instructions for developing a rule of law was substantially unjustified. *Emma* involved the resurvey of an island in the Snake River, a navigable river. The First Assistant Secretary's

In accord with the *Hardin* and *Mitchell* decisions is *Grand Rapids & Indiana R. R. Co.* v. *Butler*, *supra*, wherein this Court affirmed the Michigan Supreme Court's decision awarding the riparian landowner title to a previously unsurveyed island in a navigable river. The result would have been the same even if the river had been non-navigable, for under the common law, "a grant of land bounded by a stream, whether navigable in fact or not, carries with it the bed of the stream to the center of the thread thereof." *Grand Rapids,* 159 U.S. at 94. After considering a "large mass of testimony . . . as to the character of this so-called island at the time of the original surveys and for some years subsequent," the Michigan Supreme Court stated that "it is of no consequence whether it was what might be termed an 'island' or a 'sand bar' or a 'piece of low wet ground.' The law is the same in either case." *Id.* at 89.

This Court "entirely concurred" in the Michigan court's finding that when the United States had not evidenced

---

statement that the United States can resurvey any island in a non-navigable stream is therefore dicta. *See* 39 Pub. Lands Dec. at 567. Moreover, the First Assistant Secretary and the Bureau of Land Management do not have the authority to overrule the law of the United States as determined by this Court. That law was clearly delineated in *Grand Rapids*, which held that when the United States had not evidenced an intent to reserve an island, title to the island passed to the riparian landowner under the common law. 159 U.S. at 92.

Even *Moss* v. *Ramey*, *supra*, and *Scott* v. *Lattig*, *supra*, the two principal decisions upon which the United States relies, are consistent with this Court's prior holdings that the threshold issue to be determined is the United States' intent when making the grant. *Emma S. Peterson* could not have changed this result (even if it purports so to do).

any intention to reserve the island, the island was patented to the riparian landowner under the common law:

> In the present case there is no act on the part of the government showing any intention to reserve this land. The only inference that can be drawn from the facts is that the government agents, its surveyors, did not consider it of sufficient value to survey. It was not surveyed until about twenty-five years after the survey of 1831, and not till nearly twenty years after the survey of 1837, when the other islands and the lands upon the west bank were surveyed, thus completing the survey in that region.[14]

Id. at 91-92. Based on the evidence that nothing indicated "mistake or fraud, and the government ha[d] never taken any steps predicated on such a theory," *id.* at 95, this Court

---

[14] The *Grand Rapids* decision is strikingly similar to the case at bar. In *Koch*, the deputy surveyors had also declined to survey the subject "islands," designating the land masses as, *inter alia*, "bar or low island"; "long low island, overflowing and unfit for cultivation"; and "gravel bar." Supp. App., *infra*, pp. 18sa-20sa, para. III.D.2., III.D.3. In *Grand Rapids*, the United States had failed to show any interest in the subject islands for 20 to 25 years. In *Koch*, the United States failed to show any interest in the "islands" for nearly 100 years! During the century after the original surveys at issue in *Koch*, the United States did not raise any concerns regarding mistake or fraud in these surveys. In fact, the United States has stipulated that the *Koch* original surveys were not erroneous. Supp. App., *infra*, pp. 9sa, 21sa, para. III.B.5., III.B.6, III.D.7.

found that the island passed to the adjacent riparian landowners.[15]

The United States cites four courts of appeals' decisions which it alleges illustrate a "split" of authority: *United States* v. *Severson*, 447 F.2d 631 (7th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972); *Ritter* v. *Morton*, 513 F.2d 942 (9th Cir. 1975), *cert. denied*, 423 U.S. 947 (1975); *Bourgeois* v. *United States*, 545 F.2d 727 (Ct. Cl. 1976); and *Wolff* v. *United States*, 770 F. Supp. 1205 (W.D. Mich. 1991), *aff'd*, 967 F.2d 222, *reh'g denied*, 974 F.2d 702 (6th Cir. 1992).[16] The United States argues that the *Bourgeois* and *Wolff* decisions "have ruled that *Scott* is not controlling and have reached a contrary result [as compared to *Severson* and *Ritter*]." U.S. Pet. at 16.

---

[15] On the basis of this Court's decisions in *Hardin*, *Mitchell*, and *Grand Rapids*, the Landowners submit that the United States overreaches in its interpretation of *Whitaker* v. *McBride*, 197 U.S. 510 (1904). The United States relies upon *Whitaker* to support its claim that it has somehow implicitly reserved a universal authority to survey any previously unsurveyed islands and dispose of them thereafter, without any consideration of its intent when patenting the adjacent riparian uplands. *See* U.S. Pet. at 20, n. 10. *Whitaker* did not analyze the circumstances under which the United States could survey a previously unsurveyed island for purposes of sale to a settler. The United States was not a party, and therefore its rights were not at issue. The Landowners submit, however, that if the United States' rights had been at issue in *Whitaker*, this Court would have followed its prior decisions and considered first whether "there [was any] act on the part of the government showing any intention to reserve this land." *See Grand Rapids*, 159 U.S. at 92. *See also, Hardin*, 140 U.S. at 384.

[16] *See* U.S. Pet. at 17-21.

The Landowners maintain that this purported "split" is nonexistent. These four courts of appeals' decisions rely upon and are consistent with the Supreme Court precedent analyzing title to islands by considering foremost the United States' intent when patenting the littoral lands, and, if that intent is not apparent, by looking to state law to construe the grant. *See e.g.*, *Hardin*, 140 U.S. at 384; *Grand Rapids*, 159 U.S. at 94. *Bourgeois* and *Wolff* reach a different result from *Severson* and *Ritter* and uphold the riparian landowners' claims to title of the islands, but only because the United States' intent was ambiguous when the riparian lands were surveyed and patented. Had the United States made its intent to retain title to the islands clear, the *Bourgeois* and *Wolff* courts would have held for the United States. Under the circumstances, however, they were directed by Supreme Court precedent to look to state law, which provided that the title was vested in the littoral landowners.

In the first of the four cited courts of appeals' decisions, *United States* v. *Severson*, the court considered title to Mississippi River islands which were large (20 acres and 254.81 acres) in comparison to the patented littoral lots (38.4 acres and 33.6 acres). The evidence disclosed that the islands existed at the time of Wisconsin statehood. "Applying the explanations of *Scott* v. *Lattig*," the Seventh Circuit found that the United States had retained title when it patented the littoral land. 447 F.2d at 635.

Scott had explained that when an island was large enough (138.15 acres) vis-à-vis the patented littoral lots, omission of the island from the original survey was

attributable to error. 227 U.S. at 241-42. This error created an inference that the United States did not intend to convey the island when it patented the adjacent riparian land:

> Of course, the error in omitting it from the survey did not devest the United States of the title, or interpose any obstacle to surveying it at a later time. Neither was the error calculated to induce purchasers of the fractional subdivisions on the east bank to believe that by paying for the 73.30 and 98.75 acres in those tracts they would get, respectively, 54.75 and 83.40 acres more on the island on the other side of the 300-foot channel.

Ibid.[17]

---

[17] The United States argues in effect that the *Koch* Landowners could only have received the riparian uplands, because only those acres formed the basis for the purchase price of the lands patented. *See e.g.*, U.S. Pet. at 7-8, 25-26. This argument is specious. Under the United States' theory, no riparian owner on a non-navigable watercourse would own any lands beyond the United States' surveyed meander line. This is not the law. In *Hardin*, *supra*, this Court reiterated the well-settled principle that a meander line is not a boundary; the body of water whose margin is meandered is the true boundary. 140 U.S. at 381. *See also, Mitchell*, 140 U.S. at 415 (holding that the patent conveyed to the riparian landowner the land to the "actual water line of the [non-navigable] lake, wherever that may be, with the riparian rights incident to such position"). The description of the number of acres patented to the *Koch* Landowners' predecessors did

In the second cited appellate decision, *Ritter* v. *Morton*, the Ninth Circuit similarly relied upon *Scott* v. *Lattig* and considered factors indicative of whether the government intended to retain title to certain islands in the Snake River (a navigable river). These factors included the islands' size, location, remoteness and value at the time of the original survey. 513 F.2d at 948-50. As in *Scott*, the islands in *Ritter* were apparently omitted from the original survey due to the surveyor's error. *Id.* at 944, 948. The United States therefore had not intended to convey the islands to the riparian patentees.

The third cited appellate decision, *Bourgeois* v. *United States*, emphasized the distinctions between navigable watercourse cases, and non-navigable watercourse cases.[18] Noting a complete lack of on-point precedent of a non-navigable water "island case" where the intent of the United States in patenting the shoreland was not expressed, the court held the best analogy was to the non-navigable "water bed

---

not limit the scope of their grants—particularly when the United States failed to reserve the bed of the river or any land masses therein.

The Landowners also note that in the course of presenting its evidence, the United States made no attempt to compare the acreage of the subject "islands" to the patented riparian uplands. The facts of *United State* v. *Severson* are therefore clearly distinguishable from the instant case.

[18] *Bourgeois* is a non-navigable waters case. In contrast, the other cases upon which the United States relies to allege a split in authority (i.e., *Scott* v. *Lattig*, *United States* v. *Severson*, and *Ritter* v. *Morton*) are navigable waters cases. This fact alone supports this Court's denial of the United States' Petition. *See e.g.*, text *supra* pp. 7, 11.

cases." 545 F.2d at 731. The court considered the island's size (6.76 acres), its relative remoteness, its rather limited value in 1866 (the time of the original survey), and the fact that the United States did not reserve an approach to the lake to access the island when it patented the lands around the lake. *Ibid.* These considerations failed to disclose the United States' intent regarding any reservation of title. The court then held that because the United States' intent was ambiguous, ownership of the island was to be determined under state law. *Ibid.* The Landowners submit that if the *Bourgeois* court had found that the United States intended to retain title to the island (as was found in *Scott* v. *Lattig*), the court would most likely have held for the United States.

The fourth appellate case the United States cites to allege a split in authority is *Wolff* v. *United States*. In *Wolff*, the surveyors who conducted the original surveys were directed to survey all islands "suitable for cultivation." 967 F.2d at 223-24. The subject island was left unsurveyed in the 1839 and 1853 surveys and was not surveyed until 1985. The *Wolff* court considered the matter of the United States' intent, noted that no surveyor's error was apparent, and found that the littoral land was "ten times as great" in size as the island ("[t]he tail was not disproportionate in size to the dog of which it was an appendage"). *Id.* at 225. The island was of no apparent value at the time of the original survey, and "the United States did not treat the island as public land for over a century." *Id.* at 226. Also noteworthy was the fact that the United States did not reserve an approach to the lake. *Ibid.*

Based upon these facts, the *Wolff* court found that the United States did not evidence an intent to reserve title to the island, and that therefore the court was directed to determine title under state law. *Ibid.* (citing, among other cases, *Hardin*, *supra*; *Grand Rapids, supra*; and *State Land Bd.* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977)). Under Michigan law, which adopted the common law, title to the island was vested in the riparian landowner.

The United States made the same argument in *Wolff* that it made in *Koch* before the Tenth Circuit and is currently making before this Court, namely that under *Moss* v. *Ramey*, and *Scott* v. *Lattig*, the courts have no choice but to find that title to unsurveyed islands remains in the United States until they are "explicitly relinquished." *Wolff*, 967 F.2d at 225. This is not the law. The *Wolff* court explained how its decision was consistent with *Moss* and *Scott* and the other Supreme Court precedent:

> We do not read *Moss* and *Scott* as establishing so sweeping a principle. In our view these cases—which do not purport to overrule the earlier caselaw— simply represent applications of the familiar concept that the intent of the United States, express or implied, governs the scope of its land grants.

967 F.2d at 225 (citing *Oklahoma* v. *Texas*, 258 U.S. 574, 594-95 (1922)).

Thus, by relying in part upon the decisions in *Bourgeois* and *Wolff*, the Tenth Circuit in *Koch* did not

depart from precedent established by this Court or from prior decisions of the other courts of appeals. The Tenth Circuit properly decided *Koch* in the context of this Court's rulings that when the United States' intent regarding the grant of riparian uplands is ambiguous, the court must construe the grant under state law. *See* U.S. App. 6a-12a. Both the District Court and the Tenth Circuit found that with respect to the *Koch* "islands," the United States did not evidence a clear intent to reserve title. Facts, including stipulated facts, supporting this determination are many:

1. The relevant patents did not reserve the "islands" to the United States. Supp. App., *infra,* p. 6sa, para. III.A.(7).

2. Pursuant to detailed survey instructions, Deputy Surveyors Churchfield and House were directed to survey all islands separated by a perpetual channel, and to note all topographical features. Supp. App., *infra,* pp. 11sa-18sa, para. III.C.2 to III.C.5. *See also*, U.S. App. 70a.

3. Churchfield and House did not meander the subject "islands," but they did variously note them in their field notes as "gravel bar," "gravel bar overflowing," "small island," or (in one case) "large island." Supp. App., *infra,* pp. 18sa-20sa, para. III.D.2, III.D.3. The Churchfield and House surveys were accepted as having been conducted in exact accordance with the applicable survey instructions. *Id.* at p. 9sa, para. III.B.5, III.B.6. *See also,* U.S. App. 70a.

The original surveys were neither fraudulent nor erroneous. Supp. App., *infra*, p. 21sa, para. III.D.7.[19]

4. The field notes were used to prepare the relevant plats, and the original Government Land Office plats and field notes of the areas surveyed were incorporated into the original patents and made a part of the description of the lands conveyed to the *Koch* Landowners' predecessors. *Id.* at p. 22sa, para. VI.3.

5. The United States did not reserve any easements across the granted uplands to access the islands. U.S. App. at 77a.

6. There is "no evidence in the record that the United States has treated these islands as public lands." *Ibid.* In recent decades, the United States had repeatedly maintained that the "islands" were not public lands. *See supra* note 7.

7. The United States has admitted that the "islands" were "once considered worthless." U.S. Pet. at 13.[20]

---

[19] The Landowners believe that the fact that the United States has stipulated that no errors were made in the original surveys further supports the Landowners' request for attorney's fees under the Equal Access to Justice Act. *See also, supra* note 13. This lack of "fraud or mistake" on the part of the surveyors is very telling of the fact that the United States had no intention to retain title to the "islands." *See Moss* v. *Ramey*, *supra*, and *Scott* v. *Lattig*, *supra*.

[20] If the "islands" had no apparent value at the time of the survey, the United States surely did not intend to retain ownership of

Because the United States' intent was ambiguous, the District Court and the Tenth Circuit looked to Colorado law to determine title to the subject islands, pursuant to this Court's preceding opinions, and consistently with the decisions in the other federal courts.

Although no Colorado decisions are directly on point with *Koch*, the District Court and the Tenth Circuit reasonably concluded that certain Colorado decisions reflect Colorado's adoption of the common law[21] and are indicative of how Colorado law would determine rights to the islands. *See* U.S. App. at 11a (citing *More* v. *Johnson*, 193 Colo. 489, 568 P.2d 437 (1977) ("The general rule of law followed in Colorado is that a deed conveying land bordered by a non-navigable stream includes the bed to the center."); *see also, United States* v. *Goodrich Farms Partnership*, 947

---

them.

[21] Colorado statute makes this adoption of the common law clear:

> The common law of England so far as the same is applicable and of a general nature, and all acts and statutes of the British parliament, made in aid of or to supply the defects of the common law prior to the fourth year of James the First, excepting the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth, and the ninth chapter of thirty-seventh Henry the Eighth, and which are of a general nature, and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority.

COLO. REV. STAT. ANN. § 2-4-211 (West 1989).

F.2d 906, 908 (10th Cir. 1991); *People* v. *Emmert*, 198 Colo. 137, 597 P.2d 1025 (1979)).

The District Court and the Tenth Circuit found "that Colorado would follow the common law rule for islands in the river, which holds that 'all grants bounded upon a river not navigable by the common law entitle the grantee to all islands lying between the main-land and the center thread of the current.'" U.S. App. at 11a (quoting *Hardin*, 140 U.S. at 384). *See also*, U.S. App. at 79a-80a.

Therefore, the Tenth Circuit's decision that Colorado law would vest title in the Landowners is proper and does not conflict with prior decisions of this Court or of other courts of appeals.

CONCLUSION

The decision of the United States Court of Appeals, Tenth Circuit, in *Koch* v. *United States* is not in conflict with the decisions of any other United States court of appeals or of this Court. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted.

KENNETH BALCOMB
(Counsel of Record)
SCOTT BALCOMB
LORI J. M. SATTERFIELD
DELANEY & BALCOMB, P.C.
P.O. DRAWER 790
GLENWOOD SPRINGS, CO 81602
(970) 945-6546

Attorneys for Respondents

SEPTEMBER 13, 1995